89-179

No. 89-

UNITED STATES SUPREME COURT

October Term 1989

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON and wife, MARY LOU E. JACKSON, EDWARD L. McKINZIE and wife, JACQUELINE S. McKINZIE, and W.K. MIMS and wife, FRANCES G. MIMS,

Petitioner,

v.

COUNTY OF WATAUGA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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95 pp

QUESTIONS PRESENTED

I. Does the provision of N.C.G.S. Sec. 105-472 which permits counties to distribute local sales and use tax revenues (at their election) to the county and towns within the county on either an ad valorem or per capita basis violate the equal protection clause when the per capita or population basis is limited to persons residing in the county for more than six months per year and when the system is applied to a resort area with a population under the statutory method of 239 but an actual population which is much larger and which at peak periods reaches 15,000 people.

II. Does the state statutory scheme as applied in this case violate the plaintiffs' right to travel and deprive them of their privileges and immunities under Article IV, Sec. 2 of the United States Constitution.

PARTIES

The parties to this proceeding are petitioners the Town of Beech Mountain and a number of individuals: Ellen Anderson, Carl T. Browning and wife, Martha Browning, John W. Earnhardt and wife, Patricia W. Earnhardt, George E. Handley Jr. and wife, Kathleen Handley, Douglas W. Jackson, and wife, Mary Lou E. Jackson, Edward L. McKinzie and wife, Jacqueline S. McKinzie, and W.K. Mims and wife, Frances G. Mims. The individuals are comprised of permanent residents of the town of Beech Mountain, property owners whose primary residence is out of the county and property owners whose primary residence is out of the state.

Defendants are the County of Watauga, James G. Coffey, Carl Fidler, Larry Stanberry, Jay L. Teams, David J. Triplett, as Commissioners of Watauga County, and

Helen A. Powers, Secretary, N.C. Department of Revenue, and C. C. Cameron, Budget Officer for the State of North Carolina.

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NO. 89-

UNITED STATES SUPREME COURT

October Term 1989

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON and wife, MARY LOU E. JACKSON, EDWARD L. McKINZIE and wife, JACQUELINE S. McKINZIE, and W.K. MIMS and wife, FRANCES G. MIMS,	)
Petitioners,	)
v.	)
COUNTY OF WATAUGA, et al.,	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina in Town of Beech Mountain, et al. v. County of Watauga, et al., No. 409A88 (May 5, 1989).

The decision of the Supreme Court of

North Carolina is reported at 324 N.C. 409, 378 S.E.2d 780 (1989) and is reprinted at page 47 of the Appendix.

The opinion of the North Carolina Court of Appeals affirming the dismissal of petitioners' complaint below is reported at 91 N.C. App. 87, 370 S.E.2d 453 (1989) and is reprinted at page 33 of the Appendix.

The order of the trial court is unreported and it is reprinted at page A-31 of the Appendix.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on May 5, 1989. Jurisdiction of this Court exists under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides as follows:

> Sec. 1: All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article IV, Sec. 2, provides as follows:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

N.C.G.S. Sec. 105-472, "Disposition and distribution of taxes collected" provides:

> With respect to the counties in which he shall collect and administer the tax, the Secretary of Revenue shall, on a quarterly basis, distribute to each taxing county and to the muncipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax

remitted to the Secretary of Revenue from the taxing county. The Secretary shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean cities as defined by G.S. 153A-1(1).

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

(1) The amount distributable to a taxing county and to the muncipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives

within the taxing county. For this purpose, the Secretary of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all municipalities therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The State Budget Officer shall annually cause to be prepared and shall certify to the Secretary of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or

(2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the muncipalities therein in proportion to the total amount of ad valorem taxes levied by each on property have a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality which fails to provide the Department of

Revenue with information concerning ad valorem taxes levied by that county or municipality adequate to permit a timely determination of the appropriate share of that county or municipality of tax proceeds collected under this Article may be excluded by the Secretary from each quarterly distribution with respect to which such information was not provided in a timely manner, and such tax proceeds shall then be distributed only to the governmental unit or units whose information was provided in a timely manner. For the purpose of computing the distribution of the tax under this subsection to any county and the municipalities located therein for any quarter with respect to which the property valuation of a public service company is the subject of an appeal pursuant to the provisions of the Machinery Act, or to applicable provisions of federal law, and the Department of Revenue is restrained by operation of law or by a court of competent jurisdiction from certifying such valuation to the county and the municipality therein, the Department shall use the last property valuation of such public service company which has been so certified in order to determine the ad valorem tax levies applicable to such public service company

in the county and the municipalities therein.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Secretary, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for such resolution to be effective, a certified copy thereof must be delivered to the Secretary of Revenue at his office in Raleigh within 15 calendar days after its adoption. If the board fails

> to adopt any resolution or if it fails to adopt a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year.

STATEMENT OF THE CASE

Petitioners, the Town of Beech Mountain, individual homeowners living in Beech Mountain, and persons owning property in Beech Mountain primarily living out of the county and out of the state filed the complaint which is the subject matter of this Petition on August 31, 1987. The petitioners attacked, as applied to the town of Beech Mountain and themselves, the provisions of N.C.G.S. 105-472. This statute allows counties to distribute local

sales and use tax revenues both to the county government and to municipalities within the county. The method of distribution may be either on an ad valorem basis -- one based on property values -- or a on a per capita method. Until 1986-87 Watauga County distributed its sales tax revenues on an ad valorem basis. In that year, the county changed to a "per capita" method of distribution. Under this method as construed by the North Carolina Department of Revenue and approved by North Carolina's appellate courts, a town's population equals the number of residents who reside there for more than six months per year.

As a result of Watauga County's change from the ad valorem to the per capita method, revenues allotted to the town of Beech Mountain dropped from $291,111.77 in 1986-87 to approximately $19,000.00 in

1987-88, more than a ninety-three percent (93%) decrease. As a result, the town was forced to raise taxes and reduce services. These facts, together with the other facts set out below, were alleged in the plaintiffs' complaint and must be taken as true for purposes of a motion to dismiss.

Because Beech Mountain is a resort community, the people who constitute the bulk of the town's actual service population are not counted at all for purposes of distributing revenue from the local sales tax. At peak times, the actual service population of the town of Beech Mountain equals 15,000 people. For purposes of distributing revenue, the town population was calculated to be only 239. The average population of the town, at any given moment, far exceeds the number of people who are present for more than six months of the year. (Plaintiffs' complaint

App.10).

Ninety-eight percent (98%) of the property owners of Beech Mountain have their primary residence outside the county and vote outside the county. Sixty-seven percent (67%) of the property owners are from out-of-state. (Plaintiffs' complaint paragraph 22, App. 12).

The constitutional questions raised here -- denial of equal protection in violation of the Fourteenth Amendment and violation of privileges and right to travel -- were raised in plaintiffs' complaint and in the appeal to the North Carolina Court of Appeals and the North Carolina Supreme Court (App. 12, 17-19, 21, 23-25, 37, 52, 55 and 60). These courts decided these questions against the plaintiffs.

The plaintiffs herein do not attack the statutory scheme as it operates in most counties in the state where, no doubt,

distribution of revenues is at least roughly proportional either to the contribution made by the municipality's residents (for whatever period of time) to sales tax revenues or to the municipalities actual average population.

Plaintiffs complaint alleged that Watauga County's change in the method of revenue distribution constituted intentional and purposeful discriminatory action (App. 8).

REASONS FOR GRANTING THE WRIT

I. A Writ of Certiorari should be granted in this case because the equal protection issue involved is one of substantial importance to constitutional jurisprudence and because the decision of the North Carolina Supreme Court conflicts with controlling decisions of this Court.

A. Equal protection is denied.

1. To Beech Mountain's 239 "permanent"

residents.

The 239 people who live in Beech Mountain year round have been subjected to reduced services and increased taxes as a result of Watauga County's decision to allocate sales tax revenues so the true service population of Beech Mountain (a figure that includes many transient tourists) is not counted. Indeed the population is calculated to be 239. The 239 full-time residents of Beech Mountain receive lower services and pay higher taxes as a result of a ninety-three percent (93%) reduction in sales tax revenue given to their town. They have suffered in this way because their town's need for municipal services is generated by a stream of population, most of which does not live in the county for more than six months per year. These 239 people are taxed at the same level as other residents

of the county. However, they do not receive anything close to comparable benefits. Because of the dramatic decrease in their town's revenues and because the town's actual service population consisting of tourists and out-of-state and out-of-county part-time residents continues to have substantial needs, the 239 residents of Beech Mountain receive lower municipal services than their counterparts in other towns in the county whose service population is less transitory.

The North Carolina Supreme Court found a "legitimate state interest" to justify this discrimination: "The legislature could reasonably have determined that individuals dwelling within a particular municipality for more than six months of the year would be likely to purchase more items of tangible personal property than would individuals primarily residing

elsewhere." The Town of Beech Mountain, et al. v. County of Watauga, et al., 324 N.C. 409, 378 S.E.2d 780, (1989).

In this analysis, the Court failed to recognize the sales tax revenue coming from Beech Mountain and its tourists. Although it is true that an individual tourist may not contribute a substantial amount, as a group the contribution is substantial. It is also true, however, that in terms of individuals, the services tourists receive are proportionally reduced by the length of their stays. In short, in both respects the system is irrational.

B. Out-of-county and out-of-state property owners and tourists are also deprived of equal protection.

The political charm of the method used by Watauga County to distribute its sales tax revenue is that it takes funds from Beech Mountain, comprised largely of

tourists and out-of-state and out-of-county property owners (people who cannot vote locally) and re-distributes the funds to people who can vote. The system represents a transfer of revenues from the disenfranchised to the enfranchised on a substantial scale. Beech Mountain's revenues were reduced by 93%.

Municipal needs and services -- and the contribution to sales tax revenue -- are rationally related to a town's average population, rather than only to the needs and contributions of that portion of the population that happens to live in the town for six months a year. Transients require police and fire protection, drink water, pay sales tax, and generate garbage on any given day just as fully as do people who happen to live in the town for more than six months per year. For Beech Mountain and other resort communities, there is no

rational relation between the town's needs, or its contribution to sales tax revenues, and the number of six month or longer residents. The rational relation is between the town's actual service population and its peak population and their needs and their contribution to sales tax revenue.

In the unique facts of this case, the number of residents living in the town for at least six months bears no rational relation to a legitimate state objective. See, Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County, Virginia, ___ U.S.___, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989). Even if a rational relation were present, the statute would be unconstitutional as applied, because the classification by its very nature discriminates against out-of-county and out-of-state property owners. Indeed it is

the dense accumulation of out-of-county and out-of-state property owners and transient tourists who trigger the dramatic loss of revenue to Beech Mountain. Because this discrimination affects politically powerless outsiders, the discrimination here must pass a higher test of rationality either of strict or heightened scrutiny. See Levy v. Parker, 346 F.Supp. 897 (E.D. La. 1972), aff'd., 411 U.S. 978, 93 S.Ct. 2266, 36 L.Ed.2d 955 (1973). It fails even the basic test of rationality. Zobel v. Williams, 457 U.S. 55, 162 S.Ct. 2309, 72 L.Ed.2d 672 (1982).

Here as in Zobel the case involves distribution of revenues. Here, as in Zobel the distribution turns on the duration of residency, and here, as in Zobel, there is no rational justification for the discrimination adopted.

II. The decision of the North

Carolina Supreme Court deprives the plaintiffs of their privileges and immunities under Article IV, Sec. 2 of the Constitution of the United States and affects their right to travel.

The town of Beech Mountain now receives less in tax benefits and is forced to charge higher taxes because the vast majority of its actual average population and its property owners come from out-of-state and out-of-county. The scheme here impinges on the right to travel far more substantially than did the scheme struck down by this Court in Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed. 2d 672 (1982).

The decision of the North Carolina Supreme Court also deprives plaintiffs of their privileges and immunities under Article IV, Sec. 2, of the Constitution of the United States. Reduced services and

higher taxes resulted from the dense accumulation of out-of-county and out-of-state property owners and visitors who live in the town of Beech Mountain for less than six months per year. While superficially respecting the right of the plaintiffs to own real and personal property on the same terms as other residents within the state, Corfield v. Coryell, 6 F.Cas. 546 (CCED Pa. 1823), in fact, the scheme subjects residents of Beech Mountain, including out-of-state property owners, to higher taxes than are paid by other citizens of the county simply because of the dense accumulation of out-of-county and out-of-state residents and visitors who live in the town of Beech Mountain less than six months per year. See, Ward v. Maryland, 12 Wall. 418, 20 L.Ed. 449 (1879).

CONCLUSION

The judgment of the North Carolina

Supreme Court applies a scheme for distributing tax revenues which, when applied to the facts of this case, allows, for example, a town with an actual daily population of 5,000 to be treated as though the town had a population of only 100 for purposes of allocating tax revenues to the town. Such a system is not rationally related either to the contribution to sales tax revenues which flow from the residents of the town nor to the residents' needs for services. It does, however, have the remarkable political advantage that it can be inflicted on a group of persons from out-of-county and out-of-state who cannot vote in the county.

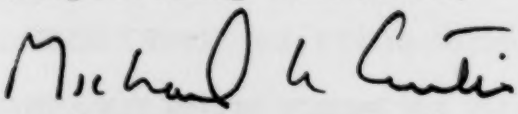
The decision of the North Carolina Supreme Court involves basic issues of equal protection, privileges and immunities and the right to travel. The North Carolina Supreme Court appears not to have

followed this Court's increasing insistence on actual, as opposed to conceivable, rationality to justify intentional discrimination. See, Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County, Virginia, ___ U.S.___, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989).

This Court should issue a Writ of Certiorari in this case. It should issue the writ because the case involves important principles of jurisprudence under the equal protection clause, specifically, whether a genuinely rational basis is required or whether a "conceivable" basis is sufficient. Second, this Court should issue a Writ of Certiorari because the decision of the North Carolina Supreme Court appears to conflict with decisions of this Court in See, Allegheny Pittsburgh Coal Company v. County Commissioner of Webster County, Virginia, ___ U.S.___, 102

L.Ed.2d 688, 109 S.Ct. 633 (1989) and in Zobel v. Williams, 457 U.S. 55, 162 S.Ct. 2309, 72 L.Ed.2d 672 (1982).

Respectfully submitted,



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APPENDIX

NORTH CAROLINA — GENERAL COURT OF JUSTICE

WATAUGA COUNTY — SUPERIOR COURT DIVISION

87 CVS [Filed 10/30/87]

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON and wife, MARY LOU E. JACKSON, EDWARD L. MCKINZIE and wife, JACQUELINE S. MCKINZIE, and W.K. MIMS and wife, FRANCIS G. MIMS,

Plaintiffs,

v.

COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERY, JAY L. TEAMS, DAVID J. TRIPLETT, as Commissioners of Watauga County, and HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, and C.C. CAMERON, BUDGET OFFICER OF THE STATE OF NORTH CAROLINA

Defendants.

AMENDED COMPLAINT

Plaintiffs, complaining of defendants, allege and say:

PARTIES

1. Plaintiff, Town of Beech Mountain (hereinafter "Plaintiff Town") is a municipality organized and existing under the laws of the State of North Carolina.

2. Plaintiff Ellen Anderson is a resident of both the Town of Beech Mountain and the County of Watauga. Plaintiffs Carl T. Browning and wife Martha Browning and Edward L. McKinzie and wife Jacqueline S. McKinzie are residents of the State of Florida. Plaintiffs John W. Earnhardt and wife Patricia W. Earnhardt are residents of Mecklenburg County, North Carolina. Plaintiffs George E. Handley, Jr. and wife Kathleen Handley are residents of both the Town of Beech Mountain and County of Watauga. Plaintiffs Douglas W. Jackson and wife Mary Lou E. Jackson are residents of Brunswick County, North Carolina.

Plaintiffs W. K. Mims and wife Frances G. Mims are residents of the State of Georgia. All of the individual plaintiffs are citizens.

3. Defendant, County of Watauga, (hereinafter "Defendant County") is a county organized an existing under the laws of the State of North Carolina.

4. Defendants, James G. Coffey, Carl Fidler, Larry Stanbery, Jay L. Teams, and David J. Triplett, (hereinafter included in the reference "Defendant County") are all of the individual commissioners of the County of Watauga, and have held such positions at all times relevant hereto. They are sued for injunctive relief only on the grounds that their action, complained of herein, under color of law has violated the North Carolina and federal constitutions and so has exceeded their lawful authority.

5. Defendant, Helen A. Powers, (hereinafter "Defendant Secretary of the Department of Revenue") is made a defendant in this action solely in her capacity as Secretary of the North Carolina Department of Revenue, a department of the State of North Carolina. Said defendant is included in this action for the sole and limited reason that the North Carolina Department of Revenue distributes the tax revenues which are the subject of this action and the relief plaintiffs are seeking would affect the manner in which said defendant distributes said tax revenues; and C. C. Cameron, Budget Officer for the State of North Carolina is made a defendant in this actin solely in his capacity as Budget Officer of the State of North Carolina.

FACTS

6. N.C.G.S. Section 105-39, 105-40, and 105-42 authorize the levy of a local

sales and use tax (hereinafter for convenience these taxes will be referred to as "the local sales tax" or "the tax"). These statutes provide for a total of a two percent (2%) tax. Pursuant to these statutes, Defendant County has levied such a tax.

7. Pursuant to N.C.G.S. 105-39, 105-40, and 105-42, the Department of Revenue has the authority and responsibility to distribute revenues collected pursuant to the local sales tax. Defendant Secretary of the North Carolina Department of Revenue distributes the local sales tax revenues quarterly on or about the following dates of each year: February 15th, May 15th, August 15th, and November 15th.

8. The North Carolina Statutes provide that counties shall distribute local sales tax revenues on either a per capita basis or an ad valorem basis as defined in the

statutes. For all fiscal years prior to and including the year 1986-1987, Defendant County distributed said tax revenues on an ad valorem basis.

9. On April 6, 1987, Defendant County changed its method of sales tax distribution to the per capita basis as defined in said statutes. That decision took effect July 1, 1987, the beginning of fiscal year 1987-1988 for both Defendant County and Plaintiff Town of Beech Mountain.

10. Plaintiffs aver on information and belief that Watauga County intends to and will continue to distribute the sale tax revenue on a per capita basis.

11. During fiscal year 1986-1987, Plaintiff Town of Beech Mountain (hereinafter Beech Mountain) received $291,111.77 in sales and use tax revenues under the ad valorem method. For fiscal

year 1987-1988, it is projected that Beech Mountain will receive $18,980.99 in sales and use tax revenues pursuant to the per capita method. This change represents a decrease in sales tax revenues received by Beech Mountain of $272,130.78 or 93.48%.

12. During the fiscal year 1986-1987, Defendant County received $2,506,643.95 in sales and use tax revenues pursuant to the ad valorem method. For fiscal year 1987-1988, it is projected that Defendant County will receive $2,713,963.58 in sales and use tax revenues pursuant to the per capita method. This change represents an increase in sales tax revenues received by the county of $207,319.63 or 8.27%.

13. As a result of Defendant County's change in the method of sales tax distribution, Beech Mountain has been forced to reduce its budget for fiscal year 1987-1988 by $226,070.00 when compared to

its budget for the previous year. This reduction represents a 13.55% decrease in Beech Mountain's budget and has produced a reduction in Town services.

14. As a result of Defendant County's purposeful and intentional and discriminatory action, the Town of Beech Mountain has also been forced to increase its property tax rate by $.06 per $100.00 in order to generate additional revenues of $102,070.00. This change represents a 12.47% increase in the budgeted property tax revenues for fiscal year 1987-1988 over the previous year.

15. The Beech Mountain Sanitary District has been forced to reduce its budget for fiscal year 1987-1988 by $47,740.00 when compared to its budget for the previous year. In addition, the Beech Mountain Sanitary District has been forced to increase its property tax rate by $0.02

per $100.00 to generate additional revenues of $29,250.00. This change represents a 19.8% increase in the budgeted property tax revenues for fiscal year 1987-1988 over the previous year.

16. According to the North Carolina Department of Revenue, for the fiscal year 1986-1987 the percentages of total property tax levies within Watauga County were as follows:

(a) County of Watauga - 66.86409%

(b) Town of Boone - 17.88731%

(c) Town of Beech Mountain - 7.75165%

(d) Town of Blowing Rock - 6.26091%

(e) Town of Seven Devils - 1.23604%

17. Population as defined by the Department of Revenue excludes persons residing in the Counties or Municipalities less than six months per year. Most of Beech Mountain's actual or service population fits into this category.

According to the North Carolina Department of Revenue, for the fiscal year 1986-1987 the "population" figures for Watauga County and the municipalities located therein were as follows:

(a) County of Watauga - 34,173

(b) Town of Boone - 11,289

(c) Town of Beech Mountain - 239

(d) Town of Blowing Rock - 1,432

(e) Town of Seven Devils - 71

Total - 47,204

18. Tourism is the primary industry in the Town of Beech Mountain. The number of persons using Town services at different times of the year far exceeds the number of residents living in the town more than six months per year. At certain times of the year, as many as 15,000 person are in the Town of Beech Mountain and use Town services.

19. Plaintiffs are informed and so

aver that, unlike visitors and part time residents of the Town of Beech Mountain, students of Appalachian State University are counted residents of Watauga County and of the Town of Boone for purposes of distributing revenues.

20. Plaintiff Town has been notified by the North Carolina State Treasurer that as a result of House Bill 2130, ratified as Chapter 1019 of the 1985 Session (Regular Session, 1986) Laws, municipalities must contribute to the local police officers supplemental retirement plan. A copy of said notice and legislation is attached hereto as Plaintiffs' Exhibit "A" and is incorporated herein by reference.

21. Defendant County's action will allow said County to provide more services to its residents at a tax rate lower than what otherwise would have been assessed to provide such services.

22. Sixty-seven percent (67%) of the property owners in the Town of Beech Mountain have their primary residences out of the state. Ninety-eight percent (98%) of the North Carolina residents who own property in the town have their primary residences outside of Watauga County.

CLAIMS FOR RELIEF

I. Violations of Right to Travel and Equal Protection (Federal and State Constitutions), of the Law of the Land Clause (State Constitution) and of Privileges or Immunities.

COUNT I - Claims of Out of County Plaintiffs

23. Plaintiffs reallege all allegations heretofore alleged, incorporate them herein by reference, and further aver:

24. As a direct result of the action of Watauga County complained of herein, visitors, part-time residents and residents of Beech Mountain will receive fewer services for which property owners in the Town -- many of whom cannot vote in the

County -- will pay a higher tax rate.

25. Plaintiffs, W. K. Mims and wife Frances G. Mims, (hereinafter "Plaintiff Mims") are residents of the State of Georgia, own a house and tract of land located within both the Town of Beech Mountain and the County of Watauga, and reside in said house approximately six (6) months per year. According to the Watauga County Tax Supervisor's Office, said Plaintiffs' property has a value of $59,600.00. These plaintiffs paid Watauga County $187.22 for 1986 property taxes.

26. Plaintiffs, Carl T. Browning and wife Martha Browning, (hereinafter "Plaintiff Browning") are residents of the State of Florida, own three houses and three tracts of land located within both the Town of Beech Mountain and the County of Watauga, reside in one of the houses approximately six (6) months per year, and

have the other two houses available for rent twelve (12) months per year. According to the Watauga County Tax Supervisor's Office, these Plaintiffs' properties have a total value of $405,100.00. Said plaintiffs paid Watauga County $1,311.92 for 1986 property taxes.

27. Plaintiffs, Edward L. McKinzie and wife Jacqueline S. McKinzie, (hereinafter "Plaintiff McKinzie"), are residents of the State of Florida, recently purchased a 1/2 undivided interest in a condominium unit located within both the Town of Beech Mountain and the County of Watauga. Said unit will be occupied by the McKinzies four to five (4 to 5) times per year. Plaintiff McKinzie intends to rent said unit the remainder of the year. According to the Watauga County Tax Supervisor's Office, said Plaintiffs' property has a value of $51,300.00.

28. Plaintiffs, John W. Earnhardt and wife Patricia W. Earnhardt, (hereinafter "Plaintiffs Earnhardt") are residents of Mecklenburg County, North Carolina, own a house and two tracts of land located within both the Town of Beech Mountain and the County of Watauga, and reside in said house approximately five (5) months per year. According to the Watauga County Tax Supervisor's Office, said Plaintiffs' properties have a value of $67,100.00. These Plaintiffs paid Watauga County $217.01 for 1986 property taxes. These plaintiffs also own real property in Mecklenburg County, North Carolina.

29. Plaintiffs, Douglas W. Jackson and wife Mary Lou E. Jackson, (hereinafter "Plaintiff Jackson") are residents of Brunswick County, North Carolina, own a 1/2 undivided interest in a house and tract of land located within both the Town of Beech

Mountain and the County of Watauga. The other 1/2 undivided interest in said property is owned by Victor T. Sullivan and wife Evelyn G. Sullivan. The house is used by either the Jacksons or the Sullivans approximately three to four (3 to 4) months per year and is available for rent the remainder of the year. The house is used by someone approximately ten to twelve (10 to 12) months per year. According to the Watauga County Tax Supervisor's Office, said real property has a value of $65,600.00. Plaintiff Jackson also owns real property in Brunswick County, North Carolina.

30. The individual plaintiffs, and others that reside within their respective houses or condominium units, use services from the Town of Beech Mountain. Under the per capita method of tax distribution as the same is defined in N.C.G.S. 105-472,

these plaintiffs are not counted for population purposes, and the Town of Beech Mountain will not receive any sales and use tax revenue as a result of these plaintiffs' part-time residence or their properties.

31. The North Carolina Department of Revenue includes in its population figures students who reside in a community nine months or more during the year. If a student resides within a municipality nine months or more during the year, the student is counted once as a resident of the municipality and a second time as a resident of the County of Watauga. A number of students attending Appalachian State University in Boone are counted as permanent Residents of Watauga County and of Boone under the per capita method.

32. Because of the peculiar facts of this case the action by the County

distributing sales tax revenues on a per capita basis violates state and federal constitutions and exceeds the lawful authority of the County and its Commissioners. Defendant County's action violates Plaintiffs Mims', Brownings', and McKinzies' fundamental and constitutional right to travel secured by the Constitution of the United States including Article IV, Section 2, and by the Fourteenth Amendment of the United States Constitution as well as by the Constitution of North Carolina.

33. Defendant County's decision to distribute sales and use tax revenues according to the per capita method of distribution as applied in the unusual facts of this case is irrational and arbitrary and discriminates against Plaintiffs Mims, Browning, McKinzie, Earnhardt, and Jackson, in that said method counts a number of A.S.U. students for

purposes of population but does not count these plaintiffs. The County's action also discriminates against these plaintiffs because they, together with all property owners in Beech Mountain, receive lower services at a higher tax rate.

34. The action of Defendant County distributing revenues based on a per capita method as set out above violates the Equal Protection Clause of the Fourteenth Amendment to the United States and North Carolina Constitutions and the law of the land clause of the North Carolina Constitution. It does so by discriminating against the Town of Beech Mountain and its property owners, residents, and visitors because the service population of Beech Mountain is composed of a large number of part-time, out-of-state and out-of-county residents and visitors. The tax burden imposed on the Town and its residents and

property owners is increased solely because the Town's population is largely composed of transients, part-time residents, and temporary visitors.

COUNT II

Full-Time Residents of Beech Mountain

34. Plaintiffs reallege all allegations heretofore alleged and not inconsistent herewith, incorporate them herein by reference, and further aver:

35. Plaintiff, Ellen Anderson, is a citizen and resident of both the Town of Beech Mountain and the County of Watauga. Plaintiff Anderson owns a house and tract of land located within both the Town of Beech Mountain and County of Watauga.

36. Plaintiffs, George E. Handley, Jr. and wife Kathleen Handley, (hereinafter Plaintiffs Handley) are citizens and residents of both the Town of Beech Mountain and County of Watauga. Plaintiffs

Handley own a house and tract of land located within both the Town of Beech Mountain and County of Watauga.

37. Defendant County's decision to change to the per capita method of distribution is unreasonable, irrational and arbitrary and discriminates against Plaintiffs Anderson and Handley by increasing said Plaintiffs' overall property tax burden as a result of the nature of Beech Mountain's population while decreasing the overall property tax burden of other Watauga County residents who do not reside within a municipality.

38. The action of Defendant County violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of the North Carolina Constitution and the law of the land clause of the North Carolina Constitution by discriminating between property owners and

residents within the County based on the extent to which they reside in a municipality whose population is made up of temporary visitors and residents who live in a municipality less than six months.

COUNT III

Plaintiffs with Properties in Several North Carolina Counties

39. Plaintiffs reallege all allegations heretofore alleged and not inconsistent herewith, incorporate them herein by reference, and further allege and say the following:

40. The County of Mecklenburg, State of North Carolina, uses the ad valorem method of sales and use tax distribution of the 1% sales and use tax levied pursuant to Article 39 of N.C.G.S. 105.

41. The County of Brunswick, State of North Carolina, uses the ad valorem method of distribution for all of the sales use tax revenues it receives.

42. The action of Defendant Watauga County in the peculiar facts of this case is unreasonable, arbitrary and capricious, and discriminates against Plaintiffs Earnhardt and Jackson by creating an arbitrary distinction between North Carolina residents.

43. In the peculiar facts of this case the action of Defendant County complained of herein violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because sales tax revenues are distributed differently in different counties. The per capita method of distribution creates a distinction which, in the peculiar facts of this case, is unrelated to the actual service population of the Town of Beech Mountain.

COUNT IV

44. Plaintiffs reallege all allegations heretofore alleged, incorporate

them herein by reference, and further aver:

45. The action of Defendant County is unreasonable, is arbitrary and capricious, and is discriminatory against Plaintiffs Mims, Browning and McKinzie by creating an arbitrary distinction between towns primarily composed of County residents and towns with a high proportion of non-North Carolina and non-county residents.

46. Said action of Defendant County violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Equal Protection and Law of the Land clauses of the North Carolina Constitution.

SECOND CLAIM FOR RELIEF -
All Plaintiffs
N.C. Constitution: Article I, Section 19
(Equal Protection and Law of Land Clauses)

47. Plaintiffs reallege all allegations heretofore alleged and not inconsistent herewith, incorporate them

herein by reference, and further aver:

48. Defendant County's decision in the unusual facts of this case, to distribute the sales and use tax revenues according to the per capita method violates the law of the land and the Equal Protection and Law of the Land Clauses, Article I, Section Nineteen of the North Carolina Constitution for the reasons set out above.

THIRD CLAIM FOR RELIEF
U.S. Constitution (Article IV, Privileges and Immunities Clause)

49. Plaintiffs reallege all allegations heretofore alleged and not inconsistent herewith, incorporate them herein by reference, and further allege and say the following:

50. As a result of Defendant County's action, municipal services provided by Plaintiff Town have been decreased while said Town's property taxes have increased. This combination of decreased services and

increased taxes has a direct and immediate adverse impact on the value of property within the Town of Beech Mountain and directly and immediately affects all plaintiff property owners in the Town. It affects visitors too because of reduced services.

51. Defendant County's action has the direct effect of discouraging non-North Carolina residents from coming to the Town of Beech Mountain and pursuing economic activity within said Town. Defendant County's action has a direct and immediate adverse impact on economic growth and development within the Town of Beech Mountain.

52. Defendant County's action has a direct and immediate adverse impact on all Plaintiffs.

53. Defendant County's action violates the Privileges and Immunities Clause,

Article IV, Section Two of the United States Constitution for the reasons set out above.

WHEREFORE, Plaintiffs pray the Court as follows:

1. That the Court enter a preliminary injunction prohibiting Defendant County from implementing its decision to distribute the sale and use tax revenues according to the per capita method, and directing the North Carolina Department of Revenue to distribute said revenues according to the ad valorem method.

2. That the Court enter an order declaring Defendant County's action in violation of the Constitution of North Carolina and of the United States Constitution.

3. That the Court issue a permanent injunction prohibiting Defendant County from implementing its decision to

distribute the sales and use tax revenues by the per capita method.

4. That this verified complaint be treated as an Affidavit for any and all purposes associated with this action.

4. For such other and further relief as the court deems just and proper.

This the 30 day of October, 1987.

s/Michael K. Curtis
Michael K. Curtis
Attorney for Plaintiffs
SMITH, PATTERSON, FOLLIN
CURTIS, JAMES & HARKAVY
700 Southeastern Building
Greensboro, N.C. 27401
Telephone: (919) 274-2992

STATE OF NORTH CAROLINA FILE # 87-CVS-474

COUNTY OF WATAUGA FILM # _____

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

[FILED 12/7/87]

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON, and wife, MARY LOU E. JACKSON, EDWARD L. MCKINZIE and wife, JACQUELINE S. MCKINZIE, and W. K. MIMS and wife, FRANCES G. MIMS,
Plaintiffs

v. ORDER

COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERY, JAY L. TEAMS, DAVID J. TRIPLETT, as Commissioners of Watauga County, and HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, and C.C. CAMERON, Budget Officer for the State of North Carolina,
Defendants

THIS CAUSE coming on to be heard and being heard by the undersigned Judge presiding on oral Motion by the plaintiffs

to amend their Complaint to correct a clerical error by changing the first line of paragraph 6 to read N.C.G.S. Section 105-463 Articles 39, 40 and 42 and changing the first line of paragraph 7 to read N.C.G.S. Section 105-463 Articles 39, 40 and 42 and the Defendants having no objection to allowing these amendments.

IT IS THEREFORE ORDERED that the Plaintiff's Complaint be amended in the first line of paragraph 6 and paragraph 7 to read N.C.G.S. Section 105-463 Article 39, 40 and 42.

Signed this the 8 day of December, 1987.

s/Charles Lamm
Judge Presiding

STATE OF NORTH CAROLINA FILE #87-CVS-474

COUNTY OF WATAUGA FILM #_____

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, JR. and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON, and wife, MARY LOU E. JACKSON, EDWARD L. MCKINZIE and wife, JACQUELINE S. MCKINZIE, and W. K. MIMS and wife, FRANCES G. MIMS,
Plaintiffs

v. O R D E R

COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERRY, JAY L. TEAMS, DAVID J. TRIPLETT, as Commissioners of Watauga County, and HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, and C.C. CAMERON, BUDGET OFFICER for the State of North Carolina,
Defendants

THIS CAUSE coming on to be heard and being heard by the undersigned Judge presiding on Motion of the Defendants to

dismiss the Plaintiff's Complaint filed herein on the ground that the Complaint fails to state a claim upon which relief can be granted, [and it appearing to the court that the Motion should be allowed;

IT IS THEREFORE ORDERED that the Plaintiff's Complaint is hereby dismissed.] Plaintiff's Exception #1.

Rendered this the 7th day of December, 1987.

Signed this the 8 day of December, 1987.

s/Charles Lamm
Judge Presiding

No. 8824SC135

NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 1988

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY JR. and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON, and wife, MARY LOU E. JACKSON, EDWARD L. MCKINZIE and wife, JACQUELINE S. MCKINZIE, and W. K. MIMS and wife, FRANCES G. MIMS,	)
Plaintiffs,	)
v.	)
COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERRY, JAY L. TEAMS, DAVID J. TRIPLETT, as Commissioners of Watauga County, and HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, and C.C. CAMERON, BUDGET OFFICER for the State of North Carolina,	)
Defendants.	

Appeal by plaintiffs from Lamm, Judge. Order entered 8 December 1987 in Superior Court, Watauga County. Heard in the Court of Appeals 2 June 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy by Michael K. Curtis for plaintiff appellants.

Eggers, Eggers and Eggers by Stacy C. Eggers, III, and Womble, Caryle, Sandridge & Rice by Anthony H. Brett for defendant appellees, Watauga County and the Commissioners of Watauga County.

Attorney General Lacy H. Thornburg by Assistant Attorney General Newton G. Pritchett, Jr., for defendant appellees, Helen A. Powers, Secretary, N.C. Department of Revenue and C. C. Cameron, Budget Officer of the State of North Carolina.

COZORT, Judge.

Plaintiffs filed a complaint to contest the constitutionality of defendant Watauga County's method of sales and use tax revenue distribution. Defendant answered and filed a motion to dismiss pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule

12(b)(6).

From the order allowing the motion, plaintiffs appeal. We affirm.

The plaintiffs in this action include the Town of Beech Mountain and certain of its full-time residents, part-time residents from other North Carolina counties and part-time residents from other states. They filed this action to enjoin defendants from distributing Watauga County's sales tax revenues on a per capita basis. They also requested a ruling declaring the per capita method of distribution unconstitutional.

Pursuant to N.C. Gen. Stat. Sec. 105-472, a county may distribute to its municipalities its local sales and use tax revenues on an ad valorem or per capita basis. For the fiscal years prior to and including 1986-87, Watauga County distributed its local tax revenues on an ad

valorem basis, but in that year the County changed to a per capita method of distribution. Under this method, a town's population equals the number of residents who reside there for more than six months of the year. Plaintiffs allege that changing the method of distribution has dramatically reduced the amount of revenues it receives, because the majority of its residents are vacation homeowners who reside there for less than six months of the year. As a result of the new method of distribution, plaintiffs allege that Beech Mountain has been forced to raise city taxes and reduce services for all residents.

After plaintiffs filed their action, defendants answered and filed a motion to dismiss pursuant to Rule 12(b)(6). The motion was granted and plaintiffs appealed, arguing that the trial court erred in

granting the motion, because the per capita method of distribution: (1) denies plaintiffs the equal protection of the law; (2) violates plaintiffs' rights to travel; and (3) deprives plaintiffs of their privileges and immunities under Article IV, Section 2 of the United States Constitution. We affirm the trial court's order.

A motion to dismiss under N.C. Gen. Stat. Sec. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint, Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970), which will be dismissed if it is completely without merit. Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337, 337 S.E.2d 132, 134 (1985). Where it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim, dismissal for failure

to state a claim upon which relief can be granted is proper. Alamance Co. v. Dept. of Human Resources, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982).

N.C. Gen. Stat. Sec. 105-472 provides for the distribution of revenues generated by the local sales and use taxes to each county from which it is collected. This statute provides that every year the board of county commissioners for each county may decide whether to distribute their proceeds from the tax on an ad valorem or a per capita basis. The ad valorem method allocates revenues to the county's muncipalities based upon the percentage of the county's taxable property located within each municipality. Under the per capita method each municipality receives that percentage of revenues equal to the percentage its population bears to the entire population of the county.

Population under this method is determined by the address each person lists as his usual residence, where he usually eats, sleeps and works. The effect of this classification is that a town's population consists of only those residents who reside there for more than six months. Plaintiffs argue that this method of distribution denies them the equal protection of the laws, because it arbitrarily distinguishes between residents who reside in the county for more than six months and those who do not. We disagree.

The Equal Protection Clause is not violated merely because a statute classifies similarly situated persons differently, so long as there is a reasonable basis for the distinction. See In re Assessment of Taxes Against Village Publishing Corp., 312 N.C. 211, 220-21, 322 S.E.2d 155, 162 (1984). When a statute is

challenged on equal protection grounds, it is subjected to a two-tiered analysis. The first tier, or "strict scrutiny" provides the highest level of review and is employed only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Id. at 221, 322 S.E.2d at 162. To survive this level of review, the government must demonstrate that the classification created by statute is necessary to promote a compelling government interest. Id. A class is suspect "when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." Texfi Industries v. City of Fayetteville, 301 N.C.1, 11, 269 S.E.2d 142, 149 (1980).

If a statute does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the statute is analyzed under the second tier and the government need only show that the classification in the challenged statute has some rational basis. In re Assessment of Taxes Against Village Publishing Corp., 312 N.C. at 221, 322 S.E.2d at 162. A statute survives analysis under this level if it bears some rational relationship to a conceivable, legitimate interest of government. Id. Statutes subject to this level of review come before the Court with a presumption of constitutionality. White v. Pate, 308 N.C. 759, 767, 304 S.E.2d 199, 204 (1983).

Plaintiffs attempt to argue that out-of-county and out-of-state property owners in Beech Mountain are a suspect class such that the statute under review is subject to

strict scrutiny. We hold, however, that individuals owning a second or vacation home for less than half of a year are not a suspect class. They are not "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." Texfi Industries, 301 N.C. at 11, 269 S.E.2d at 149.

Since the statute under review does not affect a suspect class and does not impinge on a fundamental right, it need only survive the rational basis test. Plaintiffs contend that the per capita method of distribution provided by statute bears no rational basis to a legitimate state objective.

We have examined the portion of the statute in question and hold that it bears

a rational basis to the legitimate government objective of providing a means to allocate revenues among the counties' municipalities. The purpose of imposing the sales and use tax is to provide counties and municipalities with an additional source of revenue. N.C. Gen. Stat. Sec. 105-464 (1985). The per capita method of distribution provides a reasonable means of returning revenues in an amount proportionate to those from whom they were collected. We hold that this method of revenue distribution is constitutionally valid and survives the rational basis test under the Equal Protection Clause.

Plaintiffs also contend that the per capita method of distribution burdens the right of interstate travel and deprives out-of-state residents of their privileges and immunities under Article IV, Section 2

of the Constitution. They argue that the distribution scheme discourages out-of-state residents from purchasing property in Beech Mountain, because Beech Mountain is forced to charge higher taxes and provide fewer benefits. We disagree.

"[T]he right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." Zobel v. Williams, 457 U.S. 55 n.6, 60, 72 L.Ed. 2d 672, 677-78, 102 S. Ct. 2309, 2313 (1982). "Article IV, Sec. 2, of the Constitution provides that the 'citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'" S. Ct. of New Hampshire v. Piper, 470 U.S. 274, 279, 84 L.Ed. 2d 205, 210, 105 S. Ct. 1272, 1275-76

(1985). This provision provides that those privileges and immunities which are fundamental, a state must afford equal treatment to residents and nonresidents. Id.

The statute in the case at bar does not treat nonresidents any differently than it treats residents of North Carolina. Out-of-state property owners in Beech Mountain are taxed the same and receive the same services as full-time residents of Beech Mountain and part-time residents from other counties in North Carolina. The statute in no way interferes with free migration into the State nor does it deny plaintiffs of any of the privileges and immunities guaranteed by the Constitution. Therefore, we hold that these arguments are without merit.

We hold that the order of the trial court granting defendants' motion to

dismiss should be affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

August 3, 1988

IN THE SUPREME COURT OF NORTH CAROLINA

No. 409A88 - Watauga

TOWN OF BEECH MOUNTAIN, ELLEN ANDERSON, CARL T. BROWNING and wife, MARTHA BROWNING, JOHN W. EARNHARDT and wife, PATRICIA W. EARNHARDT, GEORGE E. HANDLEY, and wife, KATHLEEN HANDLEY, DOUGLAS W. JACKSON and wife, MARY LOU E. JACKSON, EDWARD L. McKINZIE and wife, JACQUELINE S. McKINZIE, and W. K. MIMS and wife, FRANCES G. MIMS	)
v.	)
COUNTY OF WATAUGA, JAMES G. COFFEY, CARL FIDLER, LARRY STANBERRY, JAY L. TEAMS, DAVID J. TRIPLETT, as Commissioners of Watauga County, and HELEN A. POWERS, SECRETARY, N.C. DEPARTMENT OF REVENUE, and C.C. CAMERON, BUDGET OFFICER for the State of North Carolina	)

Appeal by plaintiffs pursuant to N.C.G.S. Sec. 7A-30(1) from a decision of the Court of Appeals, 91 N.C. App. 87, 370 S.E.2d 453 (1988), affirming order granting

defendants' motion to dismiss by Lamm, J., at the 7 December 1987 session of Superior Court, Watauga County. Heard in the Supreme Court 14 February 1989.

SMITH, PATTERSON, FOLLIN, CURTIS JAMES & HARKAVY, by MICHAEL K. CURTIS, for plaintiff-appellants.

EGGERS, EGGERS & EGGERS, by STACY C. EGGERS III, and WOMBLE, CARLYLE, SANDRIDGE & RICE, by ANTHONY H. BRETT and JEAN SCHULTE SCOTT, for Watauga County and Watauga County Board of Commissioners, defendant-appellees.

LACY H. THORNBURG, Attorney General, by NEWTON G. PRITCHETT, JR., Assistant Attorney General, for Helen A. Powers, Secretary N.C. Department of Revenue, and C.C. Cameron, Budget Officer of the State of North Carolina, defendant-appellees.

MARTIN, Justice.

On this appeal plaintiffs raise various and constitutional challenges to the per capita distribution under N.C.G.S. Sec. 105-472 of Watauga County's sales and use tax revenues. We hold that per capita distribution offends neither the state constitution nor the federal constitution

and, accordingly, we affirm the Court of Appeals.

Plaintiffs in this action are the Town of Beech Mountain and certain individuals who own residential property within the town's boundaries. Plaintiff property owners include full-time residents of the town, and residents of other North Carolina counties and other states who own vacation property within the town. They filed this action seeking (1) an injunction to prohibit the county from distributing tax revenues on a per capita basis, and (2) a declaratory ruling determining that the per capita allocation of tax revenues is unconstitutional.

The trial court, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of

Appeals affirmed, unanimously holding that the per capita method of distribution did not violate plaintiffs' constitutional rights.

The statutory scheme at issue directs the board of county commissioners in each taxing county to determine in April of each year the method of distribution to be used for local sales and use tax revenues during the following fiscal year. N.C.G.S. Sec. 105-472 (Cum.Supp. 1988). The statute lists two options: the ad valorem method and the per capita method.

The ad valorem method allocates revenues to each municipality based upon the percentage that the ad valorem taxes levied in a municipality bears to the total county ad valorem tax levy. Id. The per capita method, on the other hand, allocates to each municipality a percentage of the tax revenues equal to the percentage of the

county population that the municipal population represents. Id.

Under the per capita method, a town's population is determined by calculating the number of individuals residing there for more than six months of the year. According to the complaint, 98 percent of Beech Mountain's property owners maintain their primary residence elsewhere. Thus, although plaintiffs allege that at the peak of the tourist season up to 15,000 people may actually dwell in Beech Mountain on any given day, only 239 of these individuals are considered residents for purposes of determining town population under the per capita distribution method.

For the fiscal years up to and including 1986-87, Watauga County distributed its tax revenues on an ad valorem basis. For the fiscal year 1987-88, however, the County shifted to the per

capita method. Plaintiffs allege that this change resulted in a 93-percent decrease in the sales tax revenues distributed to Beech Mountain, forcing the municipality to raise city taxes and reduce services. For this reason they seek to overturn the authorizing statute on constitutional grounds.

Plaintiffs first argue that the per capita or "population" method of revenue distribution denies them equal protection under both the federal and state constitutions by creating an arbitrary distinction between those who reside in Watauga County more than six months of the year and those who reside primarily out-of-state or in other North Carolina counties. We find no merit to this assertion.

Courts traditionally employ a two-tiered analysis to resolve equal protection claims. Texfi Industries v. City of

Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980). When a legislative act operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right, the upper tier or "strict scrutiny" standard is applied, requiring the government to demonstrate that the challenged statutory classification is necessary to promote a compelling governmental interest. When the claim involves neither a suspect class nor a fundamental right, the lower tier or "rationality" standard is employed. Under this standard, the government need only show that the challenged classification bears some rational relationship to a legitimate governmental interest. Id.

In determining the appropriate standard of review in this particular case, we first consider whether the per capita method of revenue distribution operates to

the disadvantge of a suspect class. The United States Supreme Court defines a suspect class as one which has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriguez, 411 U.S. 1, 28, 36 L.Ed.2d 16, 40' reh'g denied, 411 U.S. 959, 36 L.Ed. 2d 418 (1973).

Plaintiffs gameley attempt to characterize property owners primarily residing out-of-county or out-of-state as a politically powerless underclass. For obvious reasons, however, we decline to recognize nonresident individuals owning second homes in North Carolina resort areas as a downtrodden minority. Such a group

has clearly suffered no oppression or disadvantage meriting particular consideration from the judiciary and displays none of the traditional indicia of a suspect class.

Nor do we find that plaintiffs have been denied the exercise of a fundamental right. Plaintiffs suggest that the increase in taxes and reduction in services occasioned by the per capita distribution method discourages citizens of other counties and states from purchasing property in Beech Mountain, thereby violating their right to travel.

The right to travel protects the federal interest in free interstate migration. Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed. 2d 600 (1969). Although the right to travel is considered a fundamental right, Jones v. Helms, 452 U.S. 412, 69 L.Ed.2d 118 (1981), restrictions based on

residency do not warrant strict scrutiny merely because they impinge to some limited extent on its exercise. Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306 (1974). Only those statutory classifications which so burden the right to travel that they function, in effect, as penalities upon those migrating to a new state are subject to the strict scrutiny test. E.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 39 L.Ed.2d 306 (one-year residency requirement to receive indigent medical care); Dunn v. Blumstein, 405 U.S. 330, 31 L.Ed.2d 274 (1972) (one-year residency requirement to exercise right to vote); Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed.2d 600 (one-year residency requirement to receive welfare benefits).

Here the per capita review distribution method authorized by the

statute does not rise to the level of a penalty upon nonresidents. All Beech Mountain property owners -- resident and nonresident alike -- are equally affected by this method of distribution. Nothing in the record indicates that Beech Mountain's nonresident property owners pay higher taxes, received fewer services, or are otherwise treated differently from its resident property owners. Therefore, the statute cannot be said to inhibit free interstate migration or to significantly burden the right to travel.

Because we conclude that the statute neither operates to the disadvantage of a suspect class nor interferes with the exercise of a fundamental right, we need not apply the strict scrutiny test. Instead, we focus our inquiry on whether the statute bears a rational relationship to a conceivably legitimate governmental

objective. Generally speaking, this rationality test is the appropriate standard to apply to purely economic regulations such as those governing the sales and use tax. In re Asssessment of Taxes Against Village Publishing Corp., 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 86 L. Ed.2d 710 (1985).

Under the rationality standard of review, "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice' their laws result in some inequality." McGowan v. Maryland, 366 U.S. 420, 425-26, 6 L.Ed.2d 393, 399 (1961). As long as there exists a reasonable basis for the disputed classification, this Court will not interfere with the legislature's decision. Powe v. Odell, 312 N.C. 410, 322 S.E.2d 762 (1984).

Plaintiffs insists that per capita revenue distribution is not rationally related to a legitimate state interest. We disagree. The legislature could reasonably have determined that individuals dwelling within a particular municipality for more than six months of the year would be likely to purchase more items of tangible personal property than would individuals primarily residing elsewhere. Thus, as the Court of Appeals aptly concluded, "[t]he per capita method of distribution provides a reasonable means of returning revenues in an amount proportionate to those from whom they were collected." Town of Beech Mountain v. County of Watauga, 91 N.C. App. 87, 91, 370 S.E.2d 453, 455 (1988). Providing a means of allocating revenues among the municipalities of a county is a legitimate governmental objective. Plaintiffs have failed to allege facts

sufficient, if proven, to overcome the presumption of constitutionality.

Plaintiffs next contend that per capita revenue distribution violates the privileges and immunities clause of the federal constitution. This argument, too, is meritless. The privileges and immunities clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395, 92 L.Ed. 1460, 1471, reh'g denied, 335 U.S. 837, 93 L.Ed. 389 (1948). As previously noted, Beech Mountain property owners who maintain their primary residence elsewhere are treated no differently from property owners who reside in Beech Mountain year-round. The statute contains no impermissible distinction based on state citizenship. The privileges and immunities clause is simply not implicated

in this case.

Because plaintiffs are not entitled to relief under any state of facts which could be proved in support of their claim, dismissal for failure to state a claim upon which relief could be granted was proper. St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc., 322 N.C. 77, 366 S.E. 2d 480 (1988).

The decision of the Court of Appeals is hereby AFFIRMED.